

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7013

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BROWNING DEBENTURE HOLDERS'
COMMITTEE, et al.,

Plaintiffs-Appellants,

-against-

DASA CORPORATION, et al.,

Defendants-Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES DASA CORPORATION,
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Questions Presented

It is submitted that only three questions need be considered in connection with this appeal.

1. Must an appeal from a judgment dismissing claims under §14(a) of the Securities Exchange Act of 1934 (15 U.S.C. §78n(a)) and the Trust Indenture Act of 1939 be dismissed as moot, where no evidence of monetary damages was offered and the remedy sought amounts to a mere declaration

of law without implications for practical enforcement?

2. Where the record discloses that an action was commenced in bad faith and that the conduct of the plaintiffs in the action was extremely vexatious and oppressive, may the District Court in the exercise of its discretion award to the defendants a portion of attorneys' fees incurred by them in defending the action?

3. Where (a) an appeal is taken from a decision in a controversy which has become moot, (b) frivolous assertions are made by the Appellants in that appeal and (c) that appeal has been preceded by numerous appeals by Appellants in the same action, all of which were either moot or improperly taken, should not the Appellees be awarded damages and double costs, including attorneys' fees, pursuant to FRAP 38?

Statement of the Case

Plaintiffs-Appellants, calling themselves the Browning Debenture Holders' Committee (the "Browning Committee"), commenced this action on March 30, 1972 by a motion for a preliminary injunction. In summary, the amended complaint (the "Complaint") sought to enjoin defendants from soliciting and counting consents of the holders ("the Debenture Holders") of 6% Convertible Subordinated Debentures due July 1, 1987 (the "Debentures") of Defendant-Appellee DASA Corporation, a Massachusetts corporation ("DASA"), approving two amendments to the Indenture dated as of July 1, 1967, as supplemented (the "Indenture"), between

DASA and Defendant-Appellee The Bank of New York (the "Bank"), as Trustee. One such amendment would allow DASA to sell, at any one time or from time to time, all or part of the computer systems, peripheral equipment (the "Equipment") and leases thereon (the "Leases") owned by DASA. The other amendment would reduce the conversion price of the Debentures from \$42.42 to \$21.00.

By the Complaint, the Browning Committee also sought (1) an order declaring DASA's March 9, 1972 solicitation letter (the "Solicitation Letter") to the Debenture Holders void and requiring DASA to distribute a revised solicitation letter, and (2) an order declaring DASA's 1972 annual meeting of stockholders void and requiring DASA to conduct a new meeting and to distribute new proxy materials to the holders of its common stock in connection therewith.

Named as defendants were DASA, certain present and former officers and directors of DASA, the Bank, and DASA's auditors, Arthur Andersen & Co.

According to the Complaint, the Browning Committee consists of three persons: Roy E. Brewer, who allegedly owns 700 shares of the common stock of DASA and \$25,000 face amount of Debentures; Simms C. Browning, who allegedly owns \$50,000 face amount of Debentures; and Bradley R. Brewer, who allegedly owned \$52,000 face amount of Debentures and who is also the attorney for the Browning Committee.

Claims 1 and 2 of the Complaint relate solely to (1) the 1972 proxy statement distributed by DASA to its

stockholders in connection with DASA's February 29, 1972 annual meeting of stockholders and (ii) DASA's 1971 annual report to stockholders. Claims 1 and 2 are directed against all defendants except the Bank.

Claim 3 is made against all defendants and relates to the Solicitation Letter to the Debenture Holders. Claim 4 alleges that the Bank violated its fiduciary duty to the Debenture Holders under the Indenture and the Trust Indenture Act by failing to bargain for a lower conversion price of the Debentures. Claim 5 is made against Arthur Andersen & Co. and relates to DASA's 1970 and 1971 annual reports to stockholders.

The patent absurdity and incongruity of this entire proceeding is made clear from the fact that while DASA is a defendant against which the Browning Committee sought a judgment, purportedly on behalf of two distinct classes of DASA's security holders whom the Browning Committee claims have a conflict of interests, the Browning Committee also allegedly brought this action on behalf of DASA. Hence, although the Browning Committee claimed that the reduction of the conversion price of DASA's Debentures created a conflict between DASA's stockholders and DASA's Debenture Holders, the Browning Committee sought to represent

- (a) all holders of DASA's Debentures,
- (b) all stockholders of DASA,
- (c) all persons who are holders of

both common stock and Debentures of DASA, and

(d) DASA derivatively.

For some time prior to the commencement of this action, DASA had been suffering from serious financial difficulties. To alleviate these difficulties, DASA sought to sell the Equipment and Leases in order to obtain funds to reduce its indebtedness. Having negotiated with several prospective purchasers, an agreement was reached with a corporation named Datatron Corporation for the sale of the Equipment and Leases (Ex. 4, p.16).*

Because the Indenture provided that the consent of the Debenture Holders was required in order to consummate such a sale, by the Solicitation Letter, DASA solicited their consent to amendments of the Indenture to permit the sale, and in connection therewith, a reduction in the conversion price of the Debentures from \$42.42 to \$21.00 (Ex. 4, p.1).

Although the Browning Committee never complained that the sale was in any way unfair or improper and had always admitted that the sale was in DASA's best interests (Ex.56, pp.8-9), it nevertheless sought to delay the sale until the management of DASA would agree to an amendment of the Indenture which would reduce the conversion price of the Debentures to a figure somewhere between \$6.00 and \$12.00. The members of the Browning Committee, who owned less than 2% principal amount of the Debentures, threatened to commence litigation unless their demands were met.

*References to exhibits in evidence at the trial appear herein as "(Ex. __)".

The Browning Committee revealed its true purpose in communications with DASA prior to this action and admitted the damaging nature of the consequences should DASA not capitulate to its demands. In an enclosure to a letter to DASA dated March 16, 1972, the Browning Committee's attorney stated:

"A stalemate between Management and the Browning Committee as the result of an unbridgeable gap between (i) the conversion price which Management is willing to recommend and (ii) what the Committee feels is reasonably related to the current market value of the Common Stock and a fair consideration for the debenture holders' consent is certain to result in the commencement by the Browning Committee of legal action seeking the relief described above and raising certain other legal issues. Such litigation might seriously delay (or prevent altogether) the proposed sale of computer assets and otherwise work in ways damaging to the operations of the Corporation and the interests of the Corporation's shareholders and creditors alike." (Ex. 57, p.4).

The Browning Committee confirmed this intent in the same enclosure by demanding that DASA include the following proposal in a letter to Debenture Holders:

"...that the debenture holders as a group withhold their consent to the proposed sale of assets until the Corporation's Management agrees to reduce the new conversion price of the debentures to a number, not more than \$12.00 and not less than \$6.00 reasonably related to the present market value of the Common Stock and acceptable to the Committee...." (Ex. 57, p.1).

After commencement of the litigation, the Debenture Holders were informed, by a letter dated April 21, 1972 (Ex. 98) of the Browning Committee's contentions and efforts to

seek a further reduction of the conversion price and were given an opportunity to withdraw their consents, if they had previously given them. Nevertheless, the holders of approximately 70% in principal amount of the Debentures approved the sale of the Equipment and Leases and the \$21.00 conversion price. See affidavit of Richard B. Persinger (p.3), sworn to May 3, 1972, submitted in opposition to the preliminary injunction motion.

By a memorandum opinion and order filed May 8, 1972, the United States District Court for the Southern District of New York (Motley, J.) (357 F. Supp. 1010) denied the Browning Committee's motion for a preliminary injunction in respect of the sale of the Equipment and Leases.

In so doing, the District Court concluded that "many [of the facts allegedly omitted from the Solicitation Letter] are more supposition and conclusion than fact, and that others are irrelevant, and hence immaterial, to the choice before the Debenture Holders" and that "Both DASA and the holders of the majority of the debenture principal believe DASA will be harmed if the indenture amendments and sale do not proceed." 357 F. Supp. at 1012

After carefully reviewing the original 55-page complaint, the Browning Committee's three memoranda of law and affidavit and hearing oral argument on the motion of the Browning Committee for a preliminary injunction, Judge Motley observed:

"In fact, we suspect that much of the motivation for this suit is plaintiffs'

desire to bargain defendants to a lower conversion price." 357 F. Supp. at 1012

Subsequently, a Second Supplemental Indenture was executed on May 15, 1972 and the Equipment and Leases were sold on June 1, 1972 (Ex. 45).

While claiming that the conversion price of the Debentures proposed by the management of DASA favored its stockholders at the expense of the Debenture Holders, and despite a total lack of evidence and apparent purpose, the Browning Committee sought summary judgment on Claims 1 and 2 of the Complaint -- the claims directed against the proxy materials and annual report distributed in connection with the 1972 annual meeting of stockholders -- and requested that the District Court order DASA to rehold that meeting. Because a subsequent annual meeting of stockholders had already been held, DASA cross-moved for summary judgment on Claims 1 and 2 of the Complaint, and the motion and cross-motion were submitted to Judge Thomas P. Griesa.

Judge Motley's doubts as to the bona fides of the Browning Committee's claims in respect of the solicitation of the Debenture Holders' consents to the amendment of the Indenture were echoed by Judge Griesa's obvious skepticism about Claims 1 and 2 of the Complaint. By a memorandum dated September 27, 1973, Judge Griesa denied the Browning Committee's summary judgment motion, granted DASA's summary judgment motion and dismissed those two Claims as moot.

In the memorandum, Judge Griesa noted (p.15) that "plaintiffs had in mind the basic outlines of their claims

prior to the meeting, but sought to use them solely as a bargaining point for urging that debenture holders be represented on the board and that the conversion price of the debentures be set in accordance with plaintiffs' wishes."*

The Browning Committee prosecuted this action by a protracted series of harassing maneuvers, none of which had any merit whatsoever, but which caused DASA to incur a substantial amount of legal fees in defense. And when the Browning Committee was faced with the prospect of a trial, the harassing tactics accelerated for the obvious purpose of effecting a delay.

For example, by a Notice of Motion dated March 7, 1975, the Browning Committee moved for summary judgment on Claim 3, on the purported ground that the reduction in the Debenture conversion price allegedly constituted the sale of an unregistered security, notwithstanding the fact that such a claim had not even been pleaded.

By a Notice of Motion dated March 14, 1975, the Browning Committee moved for summary judgment on Claim 4 alleging that the Bank failed to bargain on behalf of the

*On or about March 13, 1974, some five and one-half months after the September 27 memorandum was filed, the Browning Committee moved for reconsideration and reargument of the respective summary judgment motions, notwithstanding Rule 9(m) of the General Rules of the District Court requiring that such a motion must be made within ten days of the filing of the memorandum. By a memorandum, decision and order filed July 16, 1974, the District Court (Owen, J.) denied the Browning Committee's motion for reconsideration and reargument.

Debenture Holders in fixing the new conversion price, notwithstanding the acknowledgment of Bradley Brewer that this contention had no legal support.

By a memorandum opinion and order dated April 14, 1975, the summary judgment motions on Claims 3 and 4 were denied and in fact found to "border on frivolity" and to have been made in bad faith "for the sole purpose of delaying the trial now set for May 5, 1975." (p.5)

Nevertheless, by a Notice of Motion dated April 15, 1975 and affidavit of Bradley Brewer sworn to the same day, the Browning Committee again moved for summary judgment and a declaratory judgment against DASA and the Bank, purportedly on Claim 4, on the asserted ground -- which had also not been pleaded -- that an indemnity letter dated March 10, 1972 from DASA to the Bank constituted a violation of the Trust Indenture Act, which the Brewer affidavit (p.13) described as a "payoff". By the same motion, the Browning Committee sought an order permitting it to amend the Complaint to allege the participation, as joint tortfeasors, co-conspirators and aiders and abettors, of DASA, the law firm representing DASA and two members of that law firm, in an alleged plot to "bribe" the Bank to violate its duties under the Indenture.

In support of that motion, only the third page of a letter to the Bank from DASA's attorneys dated March 10 1972 was appended to the Brewer affidavit. By that third page, DASA's attorneys informed the Bank that DASA would pay

the Bank its reasonable fees and expenses in connection with the Bank's performance "in accordance with the foregoing instructions" and that DASA would furnish to the Bank its agreement to indemnify the Bank from liabilities or expenses which may arise from its acting "in accordance with these instructions", except for liabilities and expenses which may arise out of the Bank's gross negligence or bad faith.

The first two pages of that letter were not appended to the Brewer moving affidavit. Those two pages, which were submitted as Exhibit A to the opposition affidavit of I. Michael Bayda sworn to April 23, 1975, clearly disclosed that the services to be performed by the Bank for which the Bank was to be indemnified consisted solely of mailing and record-keeping services, such as mailing the Solicitation Letter to the Debenture Holders, furnishing additional copies to nominees and maintaining a record of consents received. These functions were purely ministerial duties to be performed by the Bank as a mailing agent for DASA, and had nothing to do with the Bank's duties under the Indenture. Needless to say, that motion was also denied.

In assessing the contentions of the Browning Committee that it acted in good faith, we respectfully urge the Court to review the motion papers and exhibits submitted in support of and in opposition to this motion.

The program of the Browning Committee to delay the trial became very oppressive. The Bank had been invited by the District Court to renew its motion for an undertaking,

and the Bank did in fact renew that motion. Before that motion was decided, Bradley Brewer advised counsel to the Bank that if an undertaking were required, the Browning Committee would refuse to post it and would thereby force a delay in the trial. And on April 9, 1975, he threatened to disrupt the business of the Bank by serving subpoenas on nine officers of the Bank to testify at depositions (see memorandum and order of the District Court filed April 21, 1975, p.9). By that decision filed April 21, 1975, the Browning Committee was required to file an undertaking in favor of the Bank in the amount of \$25,000.

The Browning Committee, by a Notice of Motion dated April 25, 1975, immediately moved for reargument of that decision. By that same motion, the Browning Committee also moved to stay the trial, notwithstanding the fact that it had previously moved in this Court to stay the trial, which motion had been denied by an order dated April 1, 1975. These motions were denied.

The Browning Committee remained intransigent. Commencing on April 28, 1975, one week before the scheduled trial date, summonses in this action were served on five individual defendants. These defendants had at all times been amenable to service of process and no attempts had previously been made to serve them. (See Point II, infra).

Further, dragnet subpoenas were served on Arthur Andersen & Co. personnel in Boston, Massachusetts. In opposition to a motion by Arthur Andersen & Co. to quash

these subpoenas, the Browning Committee insisted in a memorandum dated May 9, 1975 (p.1) that Arthur Andersen & Co. was still a party to this action and required to appear at the trial of this action as a party through its officers or partners, notwithstanding the fact that all claims in the Complaint against Arthur Andersen & Co. had been dismissed by a memorandum and order filed on April 21, 1975.

None of these ploys served its intended purpose; the Browning Committee was required to proceed with its case at a trial.

The presentation of the Browning Committee's case at the trial also evidenced bad faith. At the commencement of the trial, Bradley Brewer contended that he was proceeding under protest (June 2, 1975 Tr., p.9). The actual reason for that statement was obvious: he had no proof to present. Nevertheless, the Browning Committee imposed upon the Court for six days parading in witnesses who had no knowledge of the facts or who were called simply to express conclusions.

Moreover, at the trial, the allegations in Claim 3 were brought into focus and upon examination, generally fell into two categories. The first category consists of allegations based upon untenable propositions of law. The second category consists of those allegations which simply misstate disclosures actually made.

The manifest impropriety which was the genesis of this action was unequivocally confirmed at the trial. Although

reams of irrelevant papers were received in evidence over objections by DASA's counsel, no evidence was presented in support of any of the multitude of confected claims of proxy fraud. More significantly, Browning acknowledged that this action was not really commenced to vindicate any rights under the federal securities laws of any of the disparate interests on whose behalf the suit was purportedly brought, and that the Court was used as an instrument to enhance the bargaining position of the Browning Committee.

Hence, Browning testified on cross examination that the claims of violations of the proxy rules would not have been made had DASA's management reduced the conversion price of the Debentures to a figure acceptable to the Browning Committee (Browning Tr., p.196).^{*} Even more salient was the brazen admission that the action was commenced to force management to reduce the conversion price of the Debentures and that if the Browning Committee had succeeded in preventing the sale, the consequences might have been damaging to DASA, its stockholders and its Debenture Holders (Browning Tr., p.191).

This was an obvious understatement; it was the position of the Browning Committee that the sale was vital to DASA's continuing operations (Browning Tr., p.193). Indeed, in a document which the Browning Committee had

^{*}That testimony was followed by a luncheon recess (Browning Tr., p.202), during which Browning left the Courtroom with his attorney. At that time, it was apparently realized that Browning had damned the Browning Committee by his testimony, and when they returned from the luncheon recess, Browning attempted to change his testimony (Browning Tr., p.225).

introduced in evidence (Ex. 56) -- a proposed proxy statement of Roy Brewer for the solicitation of proxies for DASA's 1972 annual meeting of stockholders -- the Browning Committee asserted (pp.8-9) that the sale was so vital to DASA's continued operations that, if the Debenture Holders did not consent to it, "it is extremely difficult to imagine how DASA will be able to continue operations for very many months more."

Hence, the events culminating in the trial conclusively established that this proceeding was nothing more than a device to force a lower conversion price through factitious charges of violations of the proxy rules; that to achieve this purpose, the Browning Committee was willing to subvert the sale of the Equipment and Leases, with full knowledge of DASA's precarious financial condition and the damaging consequences to DASA and its security holders; that when this ill-conceived attempt failed, the Browning Committee resorted to oppressive and vexatious procedural tactics to obtain the same result; and that this proceeding was conceived, commenced and at all times prosecuted in bad faith.

By a decision filed January 12, 1976, Claim 3 of the Complaint was dismissed and DASA and the Bank were directed to submit affidavits showing the attorneys' fees incurred in defending this action, for which ~~the District~~ Court concluded they were entitled to be reimbursed by the Browning Committee.

Subsequent to the entry of that decision, the

Browning Committee moved for an evidentiary hearing on the amounts of attorneys' fees to be awarded. It also moved for the entry of an immediate judgment which did not incorporate a specific amount awarded for attorneys' fees, with a supplemental judgment for such amount to await the results of an appeal. Alternatively, it requested that execution on any affirmative judgment, absent a supersedeas bond, be stayed pending appeal.

By a decision of the District Court filed July 23, 1976, the request for an evidentiary hearing on the applications for attorneys' fees was granted; the motion for the entry of an immediate judgment was denied so that this Court could have before it all appealable issues at one time; the motion to stay execution of judgment, absent a supersedeas bond, was also denied.

Unregenerate, the Browning Committee devised a series of maneuvers designed to circumvent the July 23, 1976 order.* Notwithstanding the fact that the motion for the entry of a judgment from which an appeal could be taken had been specifically denied, the Browning Committee nevertheless filed an appeal from the July 23, 1976 decision. That appeal was dismissed for lack of jurisdiction by an order dated September 14, 1976.

*Browning had retained separate counsel and dissociated himself from the Browning Committee. The claims of DASA and the Bank for attorneys' fees against Browning were settled for an aggregate of \$13,000. Browning's claims against DASA, the Bank and the individual defendants were dismissed with prejudice by a stipulation filed January 7, 1977. The terms of the settlements were stated on the record at the evidentiary hearing on the applications for attorneys' fees.

In connection with that appeal, Bradley Brewer, knowing that an appeal could not properly be taken prior to the entry of a judgment, wrote to the Clerk of the United States District Court requesting that a judgment be entered and advising him that the entry of a judgment was authorized under Fed.R.Civ.P. 58. This request and advice is contained in a letter dated August 20, 1976, which was sent to the Clerk notwithstanding the fact that the District Court had specifically denied the motion of the Browning Committee for the entry of a judgment. Copies of that letter were not sent to any of the other parties or to Judge Owen. It appears that the Clerk forwarded the letter to Judge Owen, who again directed by an endorsement (filed September 2, 1976) on that letter that a judgment should not then be entered.

Thereafter, on November 22, 1976, an evidentiary hearing on the applications for attorneys' fees was held and a decision determining the amounts to be awarded to Appellees was filed on January 4, 1977.* That decision concluded with a direction that the parties may submit an appropriate judgment on notice.

Prior to the entry of a judgment, the Browning Committee, which knew that it had no right to appeal until

*Prior to the evidentiary hearing, the Browning Committee unsuccessfully moved by a Notice of Motion dated October 15, 1976 to dismiss it on the ground that the claims for attorneys' fees were in the nature of claims for malicious prosecution and that the District Court lacked jurisdiction to conduct the hearing -- notwithstanding the fact that the hearing was held at the request of the Browning Committee. It had previously made the same unsuccessful argument to this Court in its memorandum dated September 9, 1976 in opposition to DASA's motion to dismiss an appeal.

the judgment was entered, nevertheless appealed from the January 4, 1977 decision. This was undoubtedly done for the transparent purpose of again attempting to stay execution of the judgment absent a supersedeas bond. To effectuate that purpose, the Browning Committee commenced the appeal with a salvo of frivolous motions, including a motion for a stay of proceedings below, on the purported ground that the entry of a judgment would result in adverse publicity to Bradley Brewer. These motions were denied by an order of this Court dated January 14, 1977.

The notices of appeal were amended, following a motion to dismiss for lack of jurisdiction, to apply to the final judgment, which was entered on January 17, 1977. These amended notices of appeal were followed by a second salvo of frivolous motions by the Browning Committee, and shortly thereafter a third, the principal purpose of which was to attempt once again to stay execution of the judgment without posting a bond. By an order of this Court dated February 15, 1977, the motions for a stay of execution were denied. By another order of this Court dated February 15, 1977, motions to vacate documents served to facilitate enforcement of the judgment were determined to be moot.

The Browning Committee immediately returned to the District Court and made the same motions to stay execution of the judgment and to vacate the enforcement documents. Except for a clarification which was requested by the attorney for the Browning Committee that 90% of his earnings from personal services in his law partnership was exempt from

garnishment under the CPLR, which was set forth in an order filed February 23, 1977, all of these motions were denied from the bench on February 18, 1977.*

Thus, the frivolous contentions and vexatious and improper procedural tactics of the Browning Committee have not abated; the admonition of the District Court as to the use of the courts and the judicial processes has had no perceptible effect.

Point I

The Appeal from the Judgment Dismissing
Claims 3, 4 and 5 of the Complaint
Should be Dismissed as Moot

While the members of the Browning Committee may appeal from the judgment insofar as it directs affirmative relief against them, the appeal from the judgment dismissing the Claims 3, 4 and 5 of the Complaint is moot. This determination of mootness has already been made in this case.

At the trial of this action, the Browning Committee offered no evidence of any monetary damages to the Debenture Holders as a result of the transactions complained of or otherwise.** On the contrary, as has been noted, Browning acknowledged that it was the position of the Browning Committee that the sale of the Equipment and Leases was vital to DASA

*Notwithstanding the fact that these motions were denied, including motions to vacate an information subpoena served upon Bradley Brewer's law firm, neither that subpoena nor one served upon Bradley Brewer individually was ever answered.

**In its memorandum dated March 7, 1975 submitted in support of its motion for partial summary judgment on Claim 3 of the Complaint, the Browning Committee pointed out (pp.7-8) that the Debentures increased in value as a result of the reduction of the conversion price to \$21.00.

(Browning Tr., p.193) and that the loss of the sale might be damaging to DASA. the stockholders and the Debenture Holders (Browning Tr., p.191).

Accordingly, Browning was asked what relief he was seeking. The District Court sustained an objection to that question to Browning as a witness, but asked the same question to Bradley Brewer (Browning Tr., pp.199-200). Mr. Brewer responded that if there were defects of disclosure in the proxy material, that would invalidate the solicitation, the consents and the transaction, and would require a new solicitation with truthful disclosures (Browning Tr., pp. 200-201).

However, a deficient proxy solicitation would not invalidate the sale. The reason is that Datatron Corporation, the purchaser of the assets, was not made a party to this action. Hence, the transaction cannot be undone. Because the sale was consummated, this Court, by an order dated September 12, 1972, dismissed as moot the appeal of the Browning Committee from the decision of the District Court denying the motion of the Browning Committee for a preliminary injunction against the sale.

The relief suggested by the Browning Committee -- a new solicitation -- amounts to a totally useless and wasteful act. It is completely meaningless. Accordingly, the controversy is not justiciable and should be dismissed.

The Browning Committee now suggests that the appropriate relief would be a monetary award equal to the

difference between the market price of the Debentures and the value it contends the Debentures would have had if the conversion price had been reduced to \$4.50 --a suggestion which is premised on the alleged duty of DASA's management to reduce the conversion price to that figure, and which cannot in any event substitute for proof of actual damages. 15 U.S.C. §78bb(a).

By Claims 1 and 2 of the Complaint, the Browning Committee alleged that the proxy materials for DASA's 1972 annual meeting of stockholders contained material misrepresentations and omissions. The only business transacted at that meeting was the election of directors and the ratification of the selection of DASA's auditors. After this action was commenced, a 1973 annual meeting was held at which the same matters were approved.

In considering the cross-motions for summary judgment on Claims 1 and 2, the District Court concluded that the requests for damages in the prayer for relief in the Complaint were not tied in to any specific claim or claims in the Complaint. Nor was there any statement in Claim 1 or Claim 2 alleging that the asserted wrongdoing caused any specified injury or damages. In addition, in the view of the District Court, the undisputed facts conclusively negated any valid provable claims for monetary damages under Claims 1 and 2 (memorandum of Judge Griesa dated September 27, 1973, p.17). The Browning Committee nevertheless sought a new solicitation of the stockholders with corrected proxy materials.

The judgment dismissing those Claims as moot was affirmed by this Court. Browning Debenture Holders' Committee v. DASA Corp., 524 F.2d 811 (2d Cir. 1975). In words equally apposite to the remaining Claims of the Complaint, this Court wrote:

"There are few principles as firmly and as deeply embedded in our jurisprudence as the proposition that federal courts will not issue opinions unless a valid and continuing controversy exists between the litigants. See, e.g., North Carolina v. Rice, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). When, as here, an issue is rendered moot by plaintiffs' failure to specify monetary damages or other operative relief, and the remedy sought is a mere declaration of law without implications for practical enforcement upon the parties, the case is properly dismissed." 524 F.2d at 817

As the District Court noted with respect to Claims 1 and 2, the requests for damages in the prayer for relief in the Complaint are not tied in to any specific claim. No evidence of monetary damages was even offered at the trial and the testimony of Browning negated any claim of damages. The sale of the Equipment and Leases cannot be invalidated, and the controversy is completely academic.

Where the questions presented on appeal are moot, there is no justiciable controversy and the appeal must be dismissed. St. Pierre v. United States, 319 U.S. 41 (1943). See also Liner v. Jafco, Inc., 375 U.S. 301 (1964). Accordingly, it is submitted that the appeal from the judgment dismissing Claims 3, 4 and 5 of the Complaint should be dismissed as moot.

Point II

The District Court Properly Dismissed the Complaint Against the Individual Defendants

The individual defendants Ernest T. Greeff, Robert LeBuhn, Edgar B. Stern, Jr., Ronald W. Bolivar and Richard A. Reichter were first served with process in this action commencing on April 28, 1975, one week before the scheduled trial date* and more than three years after the action was commenced. Their respective motions for orders pursuant to Fed.R.Civ.P. 41(b) dismissing the action as against them were granted.

The inordinate delay of the Browning Committee in serving process on the individual defendants was alone a clear ground for dismissal of this action as against them. Undue delay in service of a summons and complaint on a defendant after the commencement of an action without adequate justification is a ground for dismissal under Rule 41(b) for failure to prosecute. Prejudice to the defendant need not be shown. Joseph Muller Corp. Zurich v. Societe Anonyme De Gerance et d'Armement, 508 F.2d 814 (2d Cir. 1974); Messenger v. United States, 231 F.2d 328 (2d Cir. 1956).

Here the Browning Committee permitted more than three years to elapse since the Complaint herein was filed

*The trial had been scheduled for May 5, 1975. See memorandum and order of the District Court filed April 16, 1975, p.5.

without serving the individuals -- clearly an "unreasonable" length of time. Each was amenable to service of process from the inception of the action. 15 U.S.C. §78aa. No valid excuse was offered for the failure to serve the individual defendants for that period.

The case for such a dismissal here, however, was even more compelling, for to permit the individuals to be brought into the action on the eve of trial could not be otherwise than prejudicial to them. They had not participated in the defense of this action and there was obviously insufficient time for them to prepare a defense, to consider whether separate counsel were needed or to take any other steps to protect their rights. On the other hand, further delay of the trial of the action would have prejudiced DASA, which had already suffered considerable detriment from the necessity of defending this oppressive and baseless suit.

Dismissal was clearly appropriate where -- as here -- the unreasonable delay in service of process after commencement of the action was prejudicial to the defendant belatedly served. Howmet Corp. v. Tokyo Shipping Co., Ltd., 318 F.Supp. 658 (D. Del. 1970); Richardson v. United White Shipping Co., 38 F.R.D. 494 (N.D. Cal. 1965).

It appears that service of process on the individual defendants was but another ploy in the continuing efforts of the Browning Committee to delay the trial of this action, and thus constituted an abuse of process. It is submitted that the District Court properly dismissed the action as against the individual defendants.

Point III

The District Court Properly
Denied the Motion of the
Browning Committee to Certify
the Action as a Class Action

The Browning Committee erroneously claimed to represent DASA's stockholders and DASA's Debenture Holders. By an Order to Show Cause dated May 19, 1972, the Browning Committee brought on a motion for a determination, pursuant to Fed.R.Civ.P. 23(c)(1) and Rule 11A of the Civil Rules of the District Court, whether or not this action was to be maintained as a class action and, if so, the membership of the class. The District Court (Griesa, J.), by an endorsement dated January 15, 1973, deferred final determination of the motion until further discovery had been completed and further pre-trial hearings had been held to narrow and eliminate issues.

Although no discovery was thereafter even initiated, much less completed, by a memorandum filed on or about March 13, 1974, the Browning Committee renewed its class action motion. That motion was denied by a memorandum, decision and order filed July 16, 1974 (Owen, J.), which evidenced a recognition that the Browning Committee did not represent the interests of anyone.

It is respectfully submitted that that decision was unquestionably correct for the reasons and based upon the authorities set forth therein, and for the "other apparently meritorious reasons" referred to therein (p.5) which were set forth in DASA's memorandum filed March 22, 1974 (pp.18-21) in opposition to the motion for class certification.

Point IV

The District Court Did Not Abuse Its Discretion in Denying the Motion of the Browning Committee for an Order Directing That Depositions be Taken Through the Use of Tape Recordings

The motion of the Browning Committee for an order directing that depositions be taken by tape recordings was made by a Notice of Motion and affidavit of Bradley Brewer, sworn to July 12, 1974. It sought to dispense with an independent operator and did not provide adequate safeguards. Where the taking of depositions has been permitted through the use of tape recordings, some courts have required that the equipment be operated by an independent operator. Jarosiewicz v. Conlisk, 60 F.R.D. 121 (N.D. Ill. 1973); Kallen v. Nexus Corp., 54 F.R.D. 610 (N.D. Ill. 1972); Carson v. Burlington Northern Inc., 52 F.R.D. 492 (D. Neb. 1971); Wescott v. Neeman, 55 F.R.D. 257 (D. Neb. 1972). Contra, Colonial Times, Inc. v. Gasch, 509 F.2d 517 (D.C. Cir. 1975); Marlboro Products Corp. v. North American Philips Corp., 55 F.R.D. 487 (S.D.N.Y. 1972); Lucas v. Curran, 62 F.R.D. 336 (E.D. Pa. 1974); Buck v. Board of Education of the City of New York, 16 F.R.Serv.2d 112 (E.D.N.Y. 1972) (question not considered).

There are several reasons why the equipment should be operated by an independent operator, qualified as provided in the Federal Rules, who should also certify the typed transcripts of the depositions. First, in the absence of a waiver, an independent officer is required by the Fed.R.Civ.P.28(c) and 30(f).*

*Because tape recorded depositions by both sides provide mutual cost benefits, each side has an incentive to waive the requirement that the officer be independent.

Second, counsel should not be required to assume the technical and mechanical responsibilities of the operation of the equipment. Jarosiewicz v. Conlisk, supra; Kallen v. Nexus Corp., supra.

Moreover, if transcripts are prepared from the tape recordings by an adversary, rather than an independent third party, the opposing parties would be obliged, at their expense, to pay attorneys for the time required to compare the transcripts against the tapes themselves. This is particularly true where there are grounds to doubt the bona fides of the adverse party's tactics. This shifting of expense to opposing parties is not justified, particularly since the expense of taking depositions has traditionally been borne by the party calling them.

Although Rule 30(b)(4) permits deposition testimony to be recorded by other than stenographic means by Court order, the Court, in its discretion, may deny a motion therefor, and should do so unless definite safeguards have been delineated by the moving party which are reasonably acceptable to the opposing party. Jarosiewicz v. Conlisk, supra. Certain safeguards are necessary in connection with the taking of deposition testimony by tape recording because many of the problems which frequently occur can be better dealt with when the normal method of stenographic transcription is used.*

*These problems are magnified in multi-party litigation. For example, lawyers located throughout the room may speak at different voice levels and sometimes simultaneously. Under the normal method of stenographic transcription, the reporter can intervene to insure accuracy of transcription.

Courts which have considered these problems have imposed conditions in connection with orders permitting the taking of deposition testimony by the use of tape recording equipment. A set of reasonable conditions, which indicates some of the problems to be resolved, is set forth in Kallen v. Nexus Corp., supra. See also Wescott v. Neeman, supra.

In Colonial Times, Inc. v. Gasch, supra, relied upon by the Browning Committee, the Court concluded that the only factors which the district court judge could consider in ruling upon a motion under Fed.R.Civ.P. 30 (b)(4) was accuracy and trustworthiness of the procedure.* However, this Court squarely rejected that conclusion, and determined that Colonial Times misconceived the scope of the district judge's discretion. UAW v. National Caucus of Labor Committees, 525 F.2d 323, 326 (2d Cir. 1975).

The District Judge here, who was familiar with this action and its nature and purpose, could evaluate the possible benefits and prejudice of the relief requested by the Browning Committee. The district judge has a wide discretion in ruling upon a motion under Rule 30(b)(4), as he does in connection with other discovery motions. UAW v. National Caucus of Labor Committees, supra.

To establish an abuse of that discretion, the show-

*Parenthetically, the Court in Colonial Times determined that the lack of financial ability to pay for stenographic depositions was irrelevant to the grant of an order under Fed.R.Civ.P.30(b)(4). 509 F.2d at 521 Although the Browning Committee pleads financial inability to take stenographic depositions, it offered no explanation why discovery could not be obtained by interrogatories or document discovery, for which stenographic charges would not have been incurred.

ing which the Browning Committee must make was succinctly described in Delno v. Market St. Ry. Co., 124 F.2d 965 (9th Cir. 1942), where the Court stated that discretion is abused:

"...when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." 124 F.2d at 967

In deciding a motion concerning a pretrial discovery procedure, the district judge must balance its utility against the burdens imposed on the party opposing discovery. His knowledge of the history of the action may assist him in the exercise of his discretion. By the time the order under Rule 30(b)(4) was sought here, a clear pattern of oppressive conduct by the Browning Committee had emerged.* It was readily apparent that attorney and Browning Committee member Bradley Brewer could continue the oppressive course of conduct through the order sought at little or no cost to himself or the Browning Committee. The Browning Committee has not shown any abuse of discretion in connection with the order denying the motion under Rule 30(b)(4), or even suggested any valid reason for a claim of abuse of discretion.

*For example, the Browning Committee, by the same Notice of Motion dated July 12, 1974, moved for an order requiring DASA to submit proposed findings of fact in response to proposed findings submitted by the Browning Committee which were argumentative, replete with inflammatory characterizations, and for the most part substantially identical to requests for admissions of fact to which DASA had already responded. This patently frivolous motion was opposed by DASA for the reasons set forth in its opposition memorandum filed July 26, 1974, and was properly denied.

Far from meeting this standard, the Browning Committee has not made any showing that Judge Owen's decision was one with which any reasonable man would disagree.

Point V

DASA's Management Did Not Violate
any Duty to the Debenture Holders

At the trial, the Browning Committee sought to offer conclusory testimony through Browning to the effect that the interests of the Debenture Holders could not have been considered by DASA's management in fixing the new conversion price of the Debentures at \$21.00, and that the new conversion price had no value. This conclusion was based on the difference between the new conversion price and the then current market price of DASA's common stock -- facts which were before the District Court and from which it could reach its own conclusions without the need for this testimony. The District Court determined that such an opinion was unnecessary, and that the difference between the \$21.00 conversion price and the \$4.50 per share market price of the common stock was obvious to anyone reading the Solicitation Letter (Browning Tr., pp.150-52).

The Browning Committee contends that this point does not merely involve disclosure. It contends that the management of DASA had a "fiduciary" duty to the Debenture Holders to reduce the conversion price of the Debentures to one which was related to the market price of DASA's common stock.

It was never contended that DASA's management had

no duty to the Debenture Holders. The Debenture Holders are creditors of DASA, and the duty to the Debenture Holders is no less than that owing to any other creditors. But corporate management is elected by the shareholders to represent their interests, and the interests of shareholders and bondholders in any given transaction may not be coextensive and in fact may conflict. For example, a lower conversion price may have diluted the equity of the shareholders and increased the value of the Debentures, whereas a higher conversion price may have had a contrary effect.

The Indenture did not require any reduction in the conversion price of the Debentures. The Indenture did prohibit the sale of the Equipment and Leases (Ex. 1, Sec. 6.05, p.36) and required the consent of the holders of 66 2/3% in principal amount of the Debentures to eliminate that prohibition (Ex. 1, Secs. 14.02 and 14.03, pp.85-87). It may have been difficult to obtain the required consents if Debenture Holders simply discarded the proxy materials for lack of interest in the matter. As an incentive to the Debenture Holders and to attract their interest, the reduction of the conversion price was proposed.

Although Browning admitted at the trial that the Debentures were unsecured and in fact were subordinated to the senior debt of DASA, which was in fact paid with the proceeds of the sale of the Equipment and Leases (Browning Tr., p.198), the Browning Committee had previously taken the position that the Debentures were secured by the Equipment and Leases (Browning Tr., pp.197-198), which was being

relinquished by the Debenture Holders, and for which the Browning Committee contended the Debenture Holders were entitled to be compensated in the form of a lower conversion price.

Notwithstanding the admitted invalidity of this theory, the Browning Committee tenaciously insisted that the Debenture Holders had a right to a lower conversion price, and that this purported right arose pursuant to a correlative "fiduciary" duty of DASA's management to the Debenture Holders.

On the other hand, the Browning Committee took the position that the interests of shareholders, to whom management does have a fiduciary duty under recognized legal principles, were not entitled to any weight in fixing the new conversion price because if the sale of the Equipment and Leases were not consummated and DASA went into bankruptcy, the shareholders would receive nothing. Therefore, Browning concluded "the shareholders in my opinion were owed nothing" (Browning Tr., pp.194-195). The Browning Committee sought, in effect, to transmogrify the relationship between management and the shareholders, converting the former from the representatives of the latter to their adversaries.

It is readily apparent from the self-stultifying analysis of the Browning Committee that the imposition upon management of a fiduciary duty to bondholders would put management in an untenable position. This hypothetical dilemma is not one of substance, however, because the duty

of management to bondholders is not a fiduciary duty. Chamberlain v. James, 294 Mass. 1 (1936); Thomas v. N.Y. & G.L.R. Co., 139 N.Y. 163 (1893); Stephenson v. Go-Gas Co., 268 N.Y. 372 (1935). The relationship of a corporation to debenture holders is the same as that to other creditors, United Lines Telegraph Co. v. Boston Safe Deposit & Trust Co., 147 U.S. 231 (1893); their rights are determined by the contract between the corporation and such holders. Aladdin Hotel Co. v. Bloom, 200 F.2d 627 (8th Cir. 1953). This is not changed by the convertible feature of the Debentures; a holder of convertible debentures has no greater rights than an ordinary debenture holder until such time as he converts his debentures into stock. Pratt v. American Bell Telephone Co., 141 Mass. 225 (1886).

Harff v. Kerkorian, 324 A.2d 215 (Del. Ch. 1974), again confirmed the principle that management has no fiduciary duty to bondholders. In that case the Delaware Chancery Court dismissed a complaint alleging such a breach of fiduciary duty. That decision was reversed subsequent to the trial of this action, 347 A.2d 133 (Del. 1975), on the ground that the plaintiff there had stated a cause of action alleging actual fraud by the directors of the corporation, even though the acts complained of were not expressly so characterized.

In any event, the characterization of the trans-

action here as one involving a fiduciary duty is specious. DASA has never suggested that corporate directors are free to defraud bondholders, or to violate a statute designed for their benefit. These are duties owing to corporate creditors generally. However, they have no application to the facts here. The contention that the existence of these duties, or the decision in Harff, supports an argument that DASA's directors had a duty to reduce the conversion price of the Debentures to one related to the market price of the stock cannot be bona fide. The characterization of this transaction as a breach of a "fiduciary" duty is one which does not even arguably apply to the facts in issue.

By the Solicitation Letter (Ex. 4), the Debenture Holders were informed of the reasons why the consummation of the sale of the Equipment and Leases was important to DASA and all of its security holders and were given other pertinent information concerning the transaction. They were informed of the value of the assets to be sold, the sale price and the intended use of the proceeds of the sale (Ex. 4, pp.16, 17). They were informed of the existing conversion price of the Debentures (\$42.42), the proposed new conversion price (\$21.00), the contemporaneous market price of DASA's common stock (\$4.50) (Ex. 4, p.3) and the security holdings of management (Ex. 4, pp.24-25). The Debenture Holders, therefore, were in a position to judge for themselves whether or not a vote for the amendments of

the Indenture would be in their best interests.

Moreover, in the April 21, 1972 letter from DASA's management (Ex. 98), the Debenture Holders were informed of the position of the Browning Committee with regard to the balance of interests of DASA's security holders, of the commencement of this action, of the claims made by the Browning Committee and of the relief sought. Nevertheless, as has been noted, the holders of approximately 70% in principal amount of the Debentures approved the proposed amendments of the Indenture.

Indeed, this approval vitiates any possible claim of breach of fiduciary duty. Sections 14.02 and 14.03 of the Indenture (Ex. 1) provide that the Indenture could be modified with the approval of the holders of not less than 66 2/3% in aggregate principal amount of the Debentures at the time outstanding and that such a modification would be binding upon DASA, the Trustee and all holders of the Debentures. Accordingly, the approval of the amendments to the Indenture by the Debenture Holders is a bar to this "fiduciary" duty claim. See the well-reasoned analysis in Chalmers v. Nederlandsch Amerikaansche, etc., 36 N.Y.S.2d 717 (City Ct. 1942).

The holdings of this Court in Green v. Santa Fe Industries, Inc., 533 F.2d 1283 (2d Cir.), reversed, __ U.S. __ (March 23, 1977) and Marshall v. AFW Fabric Corp., 533 F.2d 1277 (2d Cir.), vacated and remanded, 50 L.Ed.2d 162 (1976), vacated and remanded, __ F.2d __ (2d Cir. March 17, 1977) are inapposite, but the opinions in those cases are

illuminating. This Court determined in those cases that a forced merger without any valid corporate or business purpose, by which majority shareholders used corporate funds for their personal benefit to eliminate minority shareholders, constituted a "device, scheme, or artifice to defraud", under §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)). The transaction here was not in any sense forced. It was accomplished with the consent of the Debenture Holders, and motivated by compelling business purposes. Since the Browning Committee failed to establish that any material facts were misrepresented or not disclosed, their claims of unfairness of the new conversion price do not state a violation of the federal securities laws. Green v. Santa Fe Industries, Inc., *supra*; Popkin v. Bishop, 464 F.2d 714, 720 (2d Cir. 1972). See also Marsh v. Armada Corp., 533 F.2d 978 (6th Cir. 1976).

Moreover, §10(b) is inapplicable to the facts here. There was no purchase or sale of any security. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). The claim alleged with respect to the Solicitation Letter was asserted, and could only be maintained, under §14(a) of the Securities Exchange Act (15 U.S.C. §78n(a)), which deals solely with disclosure, and not with a "manipulative or deceptive device or contrivance", as does §10(b). Hence, the holdings by this Court in Green and Marshall are not remotely germane, and in any event have been invalidated by the decision of the Supreme Court in Green.

For these reasons, the legal theory of the Browning Committee that DASA's management had a "fiduciary" duty to reduce the conversion price to one related to the market price of DASA's common stock is untenable under federal and state law.

Further, in addition to the numerous other deficiencies of the "fiduciary" duty theory, the claim of breach of fiduciary duty was academic at the time of the trial, because the officers and directors of DASA -- the objects of that claim -- were not served with process in this action until shortly before the scheduled trial date and were accordingly dismissed from this action (Point II, supra).

In short, the protestations of breach of fiduciary duty in the circumstances here are hollow. The fundamental theory of the Browning Committee is unsupportable by precedent or logic and, like its cognate theory of proxy fraud, was entirely contrived.

Point VI

Claim 3 of the Complaint was Properly Dismissed

Claim 3 was the only claim remaining in this action at the time of the trial. Claims 1 and 2 had been dismissed on summary judgment motions. Claim 4 was directed solely against the Bank and was eliminated by the entry of a judgment in favor of the Bank on May 13, 1975. Claim 5 was directed solely against Arthur Andersen & Co. and was eliminated by a memorandum and order filed April 21, 1975 granting a motion of that defendant to dismiss the Complaint as against it.

Prior to the trial, the Browning Committee had moved for summary judgment, purportedly on Claim 3, on the untenable ground that the proposal by DASA to reduce the conversion price of the Debentures constituted a "sale" of a security in violation of §5 of the Securities Act of 1933 (15 U.S.C. §77e). That motion was properly denied by a memorandum and order of the District Court filed April 16, 1975, for each of the reasons set forth therein.

Claim 3 contains 21 repetitious subparagraphs which ramble over 10 pages of the Complaint. Each of these allegations was utterly groundless. Some were withdrawn during a conference before Judge Owen prior to the trial. The theoretical object of the Browning Committee at the trial was to prove the remaining allegations of Claim 3. However, the Browning Committee had different ideas.

Wide latitude was given by the District Court to the Browning Committee during the first three days of the trial. Thereafter, the District Court urged, with very little success, that the Browning Committee focus on the specific allegations of Claim 3. As appears from the portion of the trial transcript which the Browning Committee has included in the record on appeal, most of the trial time was devoted to irrelevant lines of inquiry and attempts to prove matters which had not been pleaded.

A. The Absence of a Complete Trial Record

Fed.R.Civ.P. 52(a) provides that findings of fact

by the district court "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The burden is on the appellant to include in the record on appeal the transcript of all evidence relevant to findings claimed to be unsupported or contrary to the evidence. An appellate court cannot set aside findings of fact as clearly erroneous where it does not have before it an adequate record from which that determination can be made.

The Browning Committee has failed to produce the transcript of the testimony of witnesses at the trial (Richard B. Persinger; Gordon S. Murphy) and other portions of the transcript reflecting admissions made and positions taken by the Browning Committee.* Absent a record against which the findings of the District Court are to be measured, how can this Court determine that those findings are not supported by the record? It is submitted that the Browning Committee, by its failure to produce a complete record, has virtually insulated those findings from review. Stout v. Jefferson County Board of Education, 489 F.2d 97, 98 (5th Cir. 1974); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 126 (5th Cir.), cert. denied, 414 U.S. 826, rehearing denied, 414 U.S. 1087 (1973); Green v. Aetna Ins. Co., 397 F.2d 614, 618-19 (5th Cir. 1968); Springer v. Best, 264 F.2d

*The Browning Committee did not serve Appellees with a description of the parts of the transcript it intended to include in the record, as required by FRAP 10(b).

24 (9th Cir. 1959); T.V.T. Corp. v. Basiliko, 257 F.2d 185, 187 (D.C. Cir. 1958). See also Hayes v. Consolidated Service Corp., 517 F.2d 564, 566 (1st Cir. 1975).

B. The Method of Determining the New Conversion Price

In subparagraph 22(a) of the Complaint, the Browning Committee alleged that DASA failed to disclose that it "regarded its primary obligation as being to the Common Shareholders." However, the proposed disclosure of DASA's management's view of its duties to various classes of security holders does not relate to a material fact. Management's obligations were those imposed by the applicable law. They were obligations inherent in the relationship between management and the security holders of every corporation. Thus, a recitation of the obligations imposed by that relationship was not required. All of the facts necessary to enable the Debenture Holders to make their decision were disclosed.

The claims asserted in subparagraphs 22(c) and (1) of the Complaint virtually paraphrase those asserted in subparagraph 22(a). Subparagraph 22(d) merely extrapolates from subparagraph 22(c), alleging generally that the Solicitation Letter failed to disclose how, if management recognized a duty to the Debenture Holders, a conversion price fair to the Debenture Holders was arrived at. The Complaint thus alleges the same conclusory contention four different ways.

In subparagraph 22(b), the Browning Committee expands upon this theme by complaining that the Solicitation Letter did not disclose the possibility of a conflict of interest on the part of the officers and directors of DASA, arising from their ownership of DASA common stock. Contrary to this allegation, the Solicitation Letter (pp.24-25) disclosed the security holdings of management; that of twelve officers and directors of DASA, four had no interest, direct or indirect, in the common stock of DASA; that two more had only an indirect interest therein; that another owned only a negligible amount; and that officers and directors of DASA had direct and indirect interests in over \$400,000 principal amount of the Debentures. The Browning Committee had no evidence that these disclosures were not accurate.*

Thus, it appears that the alleged potential conflict of interest which was allegedly not disclosed did not, in reality, exist at all, and that all of the facts which a Debenture Holder would have needed to form his own judgment on this question were fully and clearly disclosed. Moreover, the proposed disclosures of the mental processes leading to the new conversion price were predicated on the invalid legal

*Nevertheless, the Browning Committee now inexplicably attributes a value of more than \$11,000,000 to the common stock owned by five of DASA's directors. This result is reached by including shares owned by clients and by a public company, and by multiplying the total number by more than four times the market price. Based upon the market price at the time (\$4.50 per share), the aggregate value of the stock owned by the five directors was less than \$150,000.

theory that management had a duty to base the conversion price on the market price of the common stock.

The absurdity of this disclosure theory was underscored during the direct examination of Browning. Bradley Brewer acknowledged that a prospectus for a convertible bond offer need not contain an explanation of how the conversion price was determined. Insisting that such information was nevertheless required in the Solicitation Letter, his explanation of the difference was characteristic of this entire claim: a new investor, as opposed to an existing security holder, "is not entitled to any rights under the SEC laws." (Browning Tr., p.147)

C. The Testimony of Douglas Bellemore

Douglas Bellemore was the last witness of the Browning Committee. He had no personal knowledge of the facts; the Browning Committee proposed to have him testify as an "expert" on various subjects. Judge Owen would not permit testimony on matters on which he had already ruled against the Browning Committee and had informed the Browning Committee that he had no need for expert testimony on subjects proposed to be covered.

The thrust of the proposed testimony, as evidenced by a written offer of proof (Ex. 112 for id), was that the proposed new conversion price of the Debentures had no value and that the interests of the Debenture Holders could not have been considered in fixing the new conversion price. The District Court had previously explained why no "expert"

testimony on this matter was necessary when the Browning Committee had proffered the same conclusions through Browning (Browning Tr., pp.150-52).

The District Court was willing to hear testimony from Professor Bellemore on matters alleged in Claim 3 which were still in issue and requested that the Browning Committee specify the allegations to which his testimony would be addressed. Only two such items were specified -- those set forth in subparagraphs 22(o) and 22(r) of the Complaint. Although the Browning Committee has apparently not produced the transcript reflecting the colloquy leading to Professor Bellemore's testimony, the fact that his testimony was to be addressed solely to these two subparagraphs emerges from a review of the transcript of his testimony (e.g., pp.2, 8, 27, 33, 42, 58).

Once Professor Bellemore was on the stand, however, he was questioned by the Browning Committee's attorney on matters not relating to these two items, on matters which had not even been alleged in Claim 3, and on matters to which he was not shown to be competent to testify.

In subparagraph 22(o), it was alleged that the last paragraph of Note A of the Notes to Consolidated Statements of Income (Loss) on page 5 of the Solicitation Letter was misleading in that it implied that a certain loss was "non-recurring, not in the ordinary course of business and beyond DASA's control" and did not contain a cross-reference to the discussion commencing on page 12 of the Solicitation

Letter, which provided an expanded description of how the loss occurred.

A reading of that paragraph shows that it is not only readily comprehensible, but it is also immediately obvious to anyone who might have read that paragraph of Note A that the discussion under the caption "Change In Magically Business" commencing on page 12 of the Solicitation Letter describes the same events. In any event, Professor Bellemore had no facts to offer on this matter. Nor did the Browning Committee have any legal support for its inventive legal principle which would require the disclosure by footnote of information fully described in the text in the same document.

In subparagraph 22(r), the Browning Committee complained that the Solicitation Letter did not disclose how the sale would enhance DASA's working capital position. This allegation is demonstrably incorrect. The proposed application of the proceeds of the sale was disclosed, as the Browning Committee itself pointed out in this very subparagraph. Hence, this allegation was refuted by the very disclosures complained of.

Working capital is the difference between current assets and current liabilities. By the sale, DASA was to receive in return for fixed assets (Ex. 4, p.39), approximately \$2,350,000 in cash, most of which was to be applied to repay certain current liabilities which were senior debt (Ex. 4, p.17), and the balance was to be available to DASA immediately. Thus the way in which working capital was to

be improved was fully disclosed. Indeed, Professor Bellemore admitted all of this (Bellemore Tr., pp.15-16, 30-32).

In fact, after the sale was consummated, DASA's working capital position did improve dramatically, from a net working capital deficit on October 31, 1971 of \$735,514, to a net working capital surplus on October 31, 1972 of \$2,539,216 (Ex. E, pp.6-7).

As to the principal purpose for Professor Bellemore's appearance -- to explain to the District Court that a \$21.00 conversion price has no value when the market price of the common stock is \$4.50 -- it is submitted that the Browning Committee should have given more credit to the intelligence of the District Court, and that there was no need for an "expert" in economics to recite that conclusion.

D. The Auditors' Certification

In DASA's 1971 annual report to stockholders (Ex. 32), one item on the balance sheet was an intangible asset described as "Excess of Purchase Price Over Net Assets Acquired". The realization of that asset was subject to future earnings of DASA's field service organization (Ex. 32, notes 1 and 3). In certifying DASA's financial statements, Arthur Andersen & Co. excepted this item and so stated in the certification (Ex. 32 - Auditors' Report). The Browning Committee alleged, in Claim 2 of the Complaint, that this information was misleading to stockholders in violation of §14(a) of the 1934 Act. A variation of this allegation was made against Arthur Andersen & Co. by Claim 5 of the Complaint -- a claim

which necessarily became moot when and for the same reason that Claim 2 became moot.

It was obvious to anyone reading DASA's financial statements that that item had no tangible value; that its realization was subject to future contingencies; and that Arthur Andersen & Co. had excepted it from its certification. And in view of DASA's working capital deficit and impending need for a substantial cash infusion, it is difficult to conceive how this matter could have affected the decisions to be made by DASA's security holders.

The Browning Committee had no extrinsic evidence bearing upon the value of this item, and had moved for summary judgment on Claim 2 on the unsubstantiated allegations of the Complaint alone, without even a supporting affidavit. The Browning Committee had simply concluded, based upon a review of DASA's 1971 annual report, that because of the exception taken by Arthur Andersen & Co., that asset had no value and therefore its inclusion in the balance sheet was misleading. However, the logical flaw leading to this latter conclusion is readily apparent. Because the very information from which this conclusion was derived was fully disclosed, no violation of §14(a) was even stated.

In any event, the allegations concerning the intangible asset and the auditors' certification were made on behalf of DASA's stockholders, not the Debenture Holders, and were directed to DASA's 1971 annual report to stockholders, and not the Solicitation Letter. These allegations were made

in Claims 2 and 5 of the Complaint, which were dismissed before trial, and were not included or incorporated by reference in Claim 3. Hence, this matter was not even a proper subject for inquiry at the trial.

Thus, the entire discourse in the Brief of the Browning Committee concerning the auditors' certification in the Solicitation Letter is not only ludicrous, but it does not even relate to anything pleaded.

E. The Trial Subpoenas

The Browning Committee incorrectly contends that the District Court prevented it from presenting evidence by quashing trial subpoenas. Subpoenas were served on personnel of Arthur Andersen & Co. in Boston (and hence outside of the territorial limits of the District Court provided by Fed.R. Civ.P. 4(f) and 45(e)) which contained extremely broad demands for document production. The Browning Committee also indicated that subpoenas had been served on employees of the Bank. In quashing the subpoenas on Arthur Andersen & Co. personnel, the District Court made clear that the Browning Committee could serve proper subpoenas which specified the documents to be produced (May 9, 1975 Tr., pp.12-13) and that although the Bank was no longer a party, its employees would be required to appear in response to proper subpoenas (May 9, 1975 Tr., pp.16-17).

As of June 2, 1975, the first day of the trial, the subpoenas had not been modified. Bradley Brewer admitted that he did not even know what documents to request (Browning

Tr., pp.48-50). Moreover, the Court directed that an employee of the Bank was required to appear to authenticate documents which the Browning Committee had selected (Browning Tr., pp. 128-136). That employee, Michael Larned, did in fact appear.

The subpoenas served in Boston on Richard A. Reichter, DASA's president, and Ronald W. Bolivar, a former officer of DASA (upon whom service was made by mail) were not valid because, among other reasons, they were beyond the subpoena jurisdiction of the District Court. The service of summonses upon them did not alter this result (see June 2, 1975 Tr., pp.5-8). A court has no power to order a civil defendant outside of its subpoena jurisdiction to appear at the trial and there to submit to examination. GFI Computer Industries, Inc. v. Fry, 476 F.2d 1 (5th Cir. 1973). See Jaynes v. Jaynes, 496 F.2d 9 (2d Cir. 1974). Nor may the defect be cured by service of the subpoena on counsel for a party (see June 2, 1975 Tr., p.5); such service is a nullity. Fed.R.Civ.P. 45 (c); Harrison v. Prather, 404 F.2d 267 (5th Cir. 1968).

F. Materiality

A misstatement in or omission from a proxy statement constitutes a violation of §14(a) of the Securities Exchange Act of 1934 only if it is material. Because the Browning Committee failed to establish that any of the alleged defects in the Solicitation Letter were material, it failed to establish an actionable claim.

The applicable standard of "materiality" was set forth in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), as follows:

"[The determination that a misstatement or omission is material] indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This requirement that the defect have a significant propensity to affect the voting process is found in the express terms of Rule 14a-9, and it adequately serves the purpose of insuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by §14(a)." (Footnote omitted; emphasis in original.) 396 U.S. at 384

More recently, that definition was refined by the Supreme Court in TSC Industries, Inc. v. Northway, Inc., 44 USLW 4852 (1976), as follows:

"The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." 44 USLW at 4855

The alleged deficiencies in the Solicitation Letter were not material, either singly or in the aggregate. In view of DASA's serious financial difficulties, the facts which the Browning Committee contends should have been disclosed could not conceivably have been considered important by the Debenture Holders. The conclusion that the deficiencies alleged were not material was independently reached

by the Securities and Exchange Commission, by the District Court and by the Debenture Holders.

In reviewing the proposed Solicitation Letter, the SEC had before it the proposed proxy statement of Roy Brewer (Ex. 56), which set forth the position of the Browning Committee and most of the claims which were repeated in the Complaint. And in reviewing the proposed supplemental letter to Debenture Holders dated April 21, 1972 (Ex. 98), the SEC had before it a proposed Browning Debenture Holders' Committee Proxy Statement, for intended distribution to the Debenture Holders, which contained the claims of the Browning Committee of alleged deficiencies in the Solicitation Letter.* The SEC also had before it DASA's financial statements, proxy materials distributed to stockholders and reports filed pursuant to the Securities Exchange Act of 1934.

In these circumstances, the clearance by the SEC of DASA's proxy materials did not simply constitute a determination that DASA's materials complied with §14(a) of the 1934 Act in form. Having knowledge of the claims of the Browning Committee and of the underlying facts, the clearance by the SEC of DASA's proxy materials establishes that the SEC had concluded (1) that the Solicitation Letter did not

*The SEC refused to permit the Browning Committee to distribute that proposed Proxy Statement, which was replete with misleading statements, until it had been corrected. As of May 8, 1972, the date the motion for a preliminary injunction was denied, that proposed Proxy Statement had not been adequately corrected or cleared for distribution by the SEC (Browning Tr., pp.181-87). See DASA's Ex. A in evidence.

contain the defects alleged or that they were not material, and (2) that the April 21, 1972 supplemental letter to Debenture Holders fairly disclosed the position of the Browning Committee.

Subsequently, in reviewing the allegations of Claim 3, the Solicitation Letter, the April 21, 1972 supplemental letter and the Browning Debenture Holders' Committee Proposal (Ex. 57), Judge Motley expressly concluded that the alleged deficiencies in the Solicitation Letter were not material. 357 F. Supp. at 1012 She also concluded that the Browning Committee was not acting in good faith, a conclusion with which Judge Griesa, who also had before him the proxy materials of both sides, expressed agreement. Judge Owen independently reached the same conclusions.

In any event, having been informed of the Browning Committee, its contentions and its purposes, the holders of only 0.3% in principal amount of Debentures withdrew their consents to the amendments of the Indenture, and, as previously stated, the holders of approximately 70% in principal amount of the Debentures consented to the amendments (transcript of testimony of Michael Larned of the Bank, pp. 12-18). Hence, any speculation as to whether the Debenture Holders might have been influenced to act differently is academic; the Debenture Holders themselves have conclusively established the contrary.

Point VII

The Awards of Attorneys' Fees to Appellees were More Than Justified by the Circumstances of this Action

By the decision filed January 12, 1976, the District Court concluded that DASA and the Bank should be reimbursed for attorneys' fees occasioned by the improper conduct of the Browning Committee in this action. The basis for that conclusion is indicated in that decision. Arthur Andersen & Co. thereafter moved for an award of its attorneys' fees, which motion was granted by the decision of the District Court filed July 23, 1976. That latter decision also granted the request of the Browning Committee for an evidentiary hearing on the respective applications. Following that evidentiary hearing, by a decision filed January 4, 1977, attorneys' fees were awarded to DASA in the amount of \$40,000, to the Bank in the amount of \$7,000, and to Arthur Andersen & Co. in the amount of \$7,000.

The Browning Committee contends that this action was commenced in good faith, although its febrile efforts to avoid a trial belies that contention, and that its claims concerning fiduciary duties presented viable legal theories which were made in good faith, as demonstrated by authorities cited by the Browning Committee, although in fact these contentions are specious and are not supported by the authorities cited.

However, the District Court did not conclude that attorneys' fees were appropriate here because these legal theories were invalid. Rather, as is clearly indicated in the decision filed January 12, 1976, the District Court concluded that this action was improperly motivated and was vexatiously prosecuted. Incessant frivolous motions and appeals were made. Misleading statements were made to the Court under oath. Various examples were cited by the District Court. The District Court could only conclude that the judicial process had been improperly used as a means of attempting to secure a financial advantage, and had thereafter been further abused by the vexatious conduct of this litigation.

The argument of the Browning Committee that the District Court exceeded its jurisdiction in awarding attorneys' fees because the Exchange Act does not expressly provide for such an award, as does the Securities Act of 1933, is demonstrably invalid. The Exchange Act does not generally provide for awards of attorneys' fees because, except in very limited circumstances, that Act does not provide express rights to maintain private civil actions. The right to maintain a private civil action for a violation of §14(a) of the Exchange Act is an implied right which was held to exist by judicial decision. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). Hence, the absence from the Exchange Act of an express authorization for an award of attorneys'

fees in an action under §14(a) has no significance.*

Indeed, in a civil action under §14(a) of the Exchange Act, this Court has noted that a court has "equitable power" to award counsel fees to a successful litigant when his adversary has acted vexatiously or in bad faith.

Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1309 (2d Cir. 1973).

Moreover, Section 10.11 of the Indenture (Ex. 1, p.58), in accordance with §315(e) of the Trust Indenture Act of 1939, 15 U.S.C. §7700o(e), provides that the Court may assess reasonable attorneys' fees against any party litigant in a suit against the Trustee, subject to certain exceptions not relevant here.

In any event, a federal court may award counsel fees to a party even without a statutory authorization when his adversary has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Hall v. Cole, 412 U.S. 1, 5 (1973). See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975).

Bad faith which would justify such an award may be found in the actions which led to the litigation or in the conduct of the litigation. Hall v. Cole, supra, 412 U.S. at 15. Courts have awarded attorneys' fees for bad faith in the actions which led to the litigation, McDonald v. Oliver, 525

*Section 18(a) of the Exchange Act, 15 U.S.C. §78r(a), which does authorize a private civil action for damages, also provides for the assessment of reasonable attorneys' fees against either party litigant.

F.2d 1217 (5th Cir. 1976), cert. denied, __ U.S. __; Class v. Norton, 505 F.2d 123 (2d Cir. 1974), and for actions in the conduct of the litigation, Carter v. Noble, 526 F.2d 677 (5th Cir. 1976); In re Boston & Providence R.R. Corp., 501 F.2d 545 (1st Cir. 1974); Basso v. Utah Power and Light Co., 495 F.2d 906 (10th Cir. 1974).

Here, as appears from the decision of the District Court filed January 12, 1976, the Court concluded that the action was both born and prosecuted in bad faith and that the Browning Committee had acted vexatiously, wantonly and for oppressive reasons. In none of the above cases in which attorneys' fees were awarded was the conduct so egregious or the degree of culpability of the offending party as extreme as that found here.

The Browning Committee contends, nevertheless, notwithstanding the overwhelming evidence in the record which justified the conclusions of the District Court, that the Browning Committee was denied an opportunity to be heard on its contention that it acted in good faith. Contrary to this contention, the claims for attorneys' fees came as no surprise. Notification was given in connection with the dilatory pretrial motions of the Browning Committee (see memorandum and order filed April 16, 1975, p.5) and in DASA's trial memorandum (pp. 38-39). And the Browning Committee was in fact given ample opportunity to prove its claimed good faith. Browning was permitted to testify on this matter and did so testify (Browning Tr., p.231). And

much of the trial transcript consists of the unsworn testimony of Bradley Brewer -- testimony which firmly supports the conclusions of the District Court.

Moreover, attorneys' fees awards under the court's "equitable power" are made only in an exceptional case; the court must be convinced from its knowledge of the litigation that an award is appropriate. Based upon the history of this action, it is submitted that the District Court could not have come to any other conclusion.

The objection to the amount of attorneys' fees awarded to DASA is ill-founded. In determining that amount, the District Court had before it the bill for DASA, the time records of each attorney for DASA who participated in the defense of this action, his hourly rate (see affid. of George D. Kappus, sworn to February 6, 1976, p.2), and a breakdown of the categories of work performed, including the number of hours applicable to each category (see affid. of George D. Kappus, sworn to January 15, 1976, pp.2-3). The award to DASA was in fact less than half of the value of the services performed, exclusive of time spent defending appeals and items excluded by DASA from its application (see affid. of George D. Kappus, sworn to October 8, 1976, p.4).

The Browning Committee also argues that the District Court, in determining the amounts to be awarded as attorneys' fees, failed to take into account the claimed financial status of the members of the Browning Committee,

and that the awards should have been nominal.* No relevant authority is offered for this claim of error, and it is submitted that the contention thus made is incorrect.

As evidenced by the applications for awards of attorneys' fees, Appellees incurred substantial costs as the result of a frivolous, improperly motivated and vexatious litigation. These costs, net of amounts deducted by Appellees in their applications for attorneys' fees for services rendered in connection with various aspects of the litigation for which reimbursement was not sought, amounted to approximately \$150,000,** of which the District Court awarded an aggregate of \$54,000.

In Chromalloy American Corp. v. Alloy Surfaces Co., Inc., 353 F. Supp. 429 (D. Del. 1973), attorneys' fees were awarded pursuant to 35 U.S.C. §285, which authorizes the award of attorneys' fees in exceptional cases under the patent law. The standards for identifying "exceptional cases" have been set forth in Park-In-Theatres, Inc. v. Perkins, 190 F.2d 137, 142 (9th Cir. 1951), as follows:

*The \$52,000 principal amount of DASA Debentures purchased by Bradley Brewer were sold by him in February, 1976 -- approximately one month after the decision filed January 12, 1976 determining that he would be liable for attorneys' fees. See affidavit of Bradley Brewer sworn to January 21, 1977 (p.6), submitted in support of a motion in this Court to stay execution of the judgment.

**See affidavits of George D. Kappus, sworn to January 15, 1976, February 6, 1976 and October 8, 1976, respectively (for DASA); affidavit of James D. Zirin, sworn to October 14, 1976 (for Arthur Andersen & Co.); affidavit of David M. Olasov, sworn to November 5, 1976 (for the Bank).

"The exercise of discretion in favor of such an allowance should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner of the particular law suit be left to bear the burden of his own counsel fees which prevailing litigants normally bear."

Thus, the circumstances in which attorneys' fees may be awarded in patent cases are the same as those existing here. In these circumstances, a nominal award would have been "grossly unjust". It is worth noting that in Chromalloy, the defendants were awarded attorneys' fees of \$475,395.

It is submitted that the award in a case such as this should be commensurate with the damages sustained; those damages are not nominal.

Point VIII

DASA Should be Awarded Damages
and Double Costs, Including
Attorneys' Fees, Pursuant to
FRAP 38, on the Ground that this
Appeal is Frivolous

In its memorandum submitted November 22, 1976 (p.2), in opposition to the applications of Appellees for attorneys' fees, the Browning Committee argued that the District Court did not have the power to award fees for services rendered in connection with the appeals in this action. As appears from the decision of the District Court filed January 4, 1977 (p.2), the Browning Committee was apparently successful in that argument; the award to DASA

was limited to services in connection with pretrial motions, pretrial preparation, the trial and preparation of proposed findings and conclusions.

There have been several appeals in this action, all of which have been frivolous. By these appeals, the Browning Committee has either pressed moot questions or sought to appeal from non-appealable orders. Prior to this appeal, this action has been brought to this Court by the Browning Committee five times:

(1) On May 22, 1972, the Browning Committee filed an appeal from the decision of Judge Motley denying its motion for a preliminary injunction in respect of the sale of DASA's Equipment and Leases. By an order dated September 12, 1972, that appeal was dismissed.

(2) On November 8, 1974, the Browning Committee filed an appeal from the judgment dated October 11, 1974 dismissing Claims 1 and 2 of the Complaint and from an order filed October 11, 1974 denying certain discovery motions. By a decision of this Court dated October 3, 1975, the judgment was affirmed and the appeal from the pretrial discovery orders was dismissed because they were not final orders, and accordingly not appealable.

(3) By a purported petition dated

March 11, 1975, the Browning Committee sought "an order in the nature of mandamus" directing the District Court to adjourn the trial, which request was denied by this Court by an order dated April 1, 1975.

(4) By an appeal filed May 22, 1975, the Browning Committee appealed from various interlocutory orders, which appeal was dismissed by this Court for lack of jurisdiction by an order dated June 24, 1975.

(5) By an appeal filed August 9, 1976, the Browning Committee appealed from the decisions and orders filed January 12, 1976 and July 23, 1976, respectively, which appeal was dismissed by this Court for lack of jurisdiction by an order dated September 14, 1976.

The initiation of the present appeal prior to entry of the final judgment, and the attendant waves of feckless motions seeking, directly and by various collateral means, to stay execution of the judgment without posting a bond, were fully consonant with the pattern of vexatious frivolity indelibly depicted by the record below. And by the present appeal, the Browning Committee raises for review virtually every one of the numerous rulings of the District Court not previously determined by this Court, although, as has been seen, all of them except the awards of attorneys' fees are

moot. Exacerbating these impositions, the presentation of positions asserted by the Browning Committee cannot be bona fide. Examples abound.

Thus, in arguing that the District Court abused its discretion in denying the motion of the Browning Committee for permission to take depositions through tape recordings, the Browning Committee urges that Colonial Times, Inc. v. Gasch, 509 F.2d 517 (D.C. Cir. 1975) requires a remand for a new trial, notwithstanding the fact that this Court, in UAW v. National Caucus of Labor Committees, 525 F.2d 323, 326 (2d Cir. 1975), expressly rejected Colonial Times.

In its arguments concerning the awards of attorneys' fees, the Browning Committee presses the frivolous assertion that the District Court lacked jurisdiction to grant the awards, notwithstanding the unequivocal decisions of the Supreme Court to the contrary.

Indeed, the entire narrative by the Browning Committee presents a fictionalized version of events which is unsupported by the record. Irresponsible charges are made of improper motives on the part of Judge Owen. Legion authorities are cited by the Browning Committee which in no way support any proposition relevant to this action.

Pursuant to the Section 11.06 of the Indenture (Ex. 1, pp.62-63), DASA is required to indemnify the Bank for its attorneys' fees and expenses incurred in the defense of this action. Hence, DASA has been doubly injured by this oppressive lawsuit and these frivolous appeals. The real

victims are, of course, the stockholders and Debenture Holders which the Browning Committee had the temerity to claim to represent.

In Fluoro Electric Corp. v. Branford Associates, 489 F.2d 320 (2d Cir. 1973), this Court, in awarding damages and costs under Rule 38, described the function of that Rule:

"Rule 38 is not premised on a showing of delay in prosecuting an appeal (Advisory Committee's Note to Rule 38; 9 Moore, Federal Practice 4251), although for a simple breach of contract case there has been inordinate delay here in satisfying the judgment. Rather the determination is one of doing justice between the parties, of penalizing a party for unnecessarily wasting the time and resources of the court. NLRB v. Smith & Wesson, 424 F.2d 1072 (1st Cir., 1970).

Here the defendant has prosecuted three appeals to this court, in addition to the numerous post-trial motions it has filed here and in the district court. In none of these appeals was there a pretense to any ground for appeal other than the claim that the judgment was against the wrong entity. Such an appeal was particularly unjustified in the case of the third appeal, in relation to which these damages are specifically sought. Rule 38 was designed to penalize litigants for just such tactics as these and to compensate those who have been put to the expense of answering such wholly frivolous appeals." 489 F.2d at 326

As indicated by the quoted language, there had been three appeals in that action and numerous post-trial motions. As here, the appellee had sought damages and costs under Rule 38 on a prior appeal, but the motion was not addressed by this Court. This Court held that its prior silence on the issue of damages and costs was by no means a deter-

mination of that issue, and that the appellee was in no way precluded from continuing to seek such relief until the matter was positively addressed by this Court. 489 F.2d at 326 See also Oscar Gruss & Son v. Lumbergens Mut. Cas. Co., 422 F.2d 1278 (2d Cir. 1970) (double costs, additional interest on the judgment and \$7,500 in attorneys' fees awarded where frivolous arguments were made on an appeal).

DASA moved for an award of damages and costs in connection with the appeal on Claims 1 and 2, but the motion was neither granted nor denied; it was not addressed by this Court. See Browning Debenture Holders' Committee v. DASA Corp., 524 F.2d 811 (2d Cir. 1975). DASA made a similar motion at the commencement of the present appeal, which was submitted at the same time as the various motions by the Browning Committee seeking a stay. By an order of this Court dated February 15, 1977, that motion was denied without prejudice to renewal before the panel which hears this appeal. That motion is hereby renewed, and we respectfully urge that it be granted.

The invocation of the judicial process entails concomitant burdens upon the parties, the courts, other litigants and the taxpayers who support the judicial system. These burdens are accepted as the fair cost of a fundamental right. But the right to invoke that process implies the obligation to do so responsibly and in good faith. Frivolous and vexatious litigation constitutes an unfair imposition upon all others who share these burdens -- the taxpayers, the opposing parties, the courts, and other litigants

competing for the time and attention of the courts. Such litigation warrants a reallocation of the burdens, both in the interest of justice and to deter others from committing similar abuses. The principle which justifies this reallocation firmly supports the awards of attorneys' fees below, and is embodied by FRAP 38.

The Browning Committee claimed immunity below, under the principle of free advocacy, from the consequences of its abuse of the judicial processes; the District Court rejected that claim. It is respectfully submitted that this Court should do no less; that the frivolous and disingenuous arguments made by the Browning Committee on this appeal should not be encouraged by the failure to impose sanctions; that this appeal is a paradigm for the application of FRAP 38; and that DASA should be awarded damages and double costs, including attorneys' fees, pursuant to that Rule, in amounts to be fixed by the Court.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed in all respects, and that DASA should be awarded damages and double costs, including attorneys' fees, pursuant to FRAP 38.

Respectfully submitted,

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I. MICHAEL BAYDA

Of Counsel

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JEFFREY SLONIM, being duly sworn, deposes and says:

That he is not a party to the action, is over 18 years of age, and resides at 2815 Coyle Street, Brooklyn, New York; and that on the 25th day of March, 1977, deponent served two copies of the annexed Brief upon

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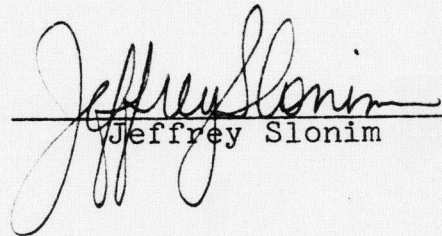
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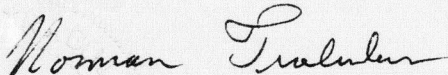
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the addresses designated by said attorneys for that purpose,
by depositing true copies of the same enclosed in postpaid
properly addressed wrappers in an official depository under
the exclusive care and custody of the United States postal
service within the State of New York.


Jeffrey Slonim

Sworn to before me this
25th day of March, 1977.


Notary Public

NORMAN TRABULUS
Notary Public, State of New York
No. 31-4611415
Qualified in New York County
Commission Expires March 30, 1979

